



**4910-06-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 209**

**[Docket No. FRA-2004-17530, Notice No. 3]**

**RIN 2130-ZA11**

**Minimum and Ordinary Maximum and Aggravated Maximum Civil Monetary Penalties for a Violation of the Hazardous Materials Transportation Laws or Regulations, Orders, Special Permits, or Approvals under those Laws**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

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**SUMMARY:** FRA is revising its regulations to reflect amendments to certain statutory civil monetary penalty provisions effected by the Moving Ahead for Progress in the 21st Century Act (MAP-21), which was enacted on July 6, 2012. These statutory amendments became effective on October 1, 2012. Pursuant to the Act, FRA is eliminating the minimum penalty for other than a training violation and adjusting both the ordinary maximum penalty and the aggravated maximum penalty that applies when assessing a civil monetary penalty for a violation of the Federal hazardous materials transportation laws or a regulation, special permit, or approval issued under those laws. FRA is also revising references to these minimums and maximums in its civil penalty assessment guidelines to conform to these statutory changes.

**DATES:** Effective Date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This final rule applies to all violations of the Federal hazardous materials transportation laws or a regulation, order, special permit, or approval issued under those laws that occur on or after October 1, 2012.

**FOR FURTHER INFORMATION CONTACT:** Joseph St. Peter, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC-12, Mail Stop 10, 1200 New Jersey Ave., SE., Washington, DC 20590 (telephone 202-493-6047), [joseph.st.peter@dot.gov](mailto:joseph.st.peter@dot.gov).

**SUPPLEMENTARY INFORMATION:**

**Amendments to the Statutory Civil Penalty Provisions**

Title III of Division C of MAP-21 (Pub. L. 112-141)—the Hazardous Materials Transportation Safety Improvement Act of 2012—revises the maximum and minimum civil penalties for violation of Federal hazardous materials transportation laws at 49 U.S.C. ch. 51 (Federal hazmat laws) or a regulation, order, special permit, or approval issued under the Federal hazmat laws (including the regulations at 49 CFR subtitle B, chapter I, subchapters A (Hazardous Materials and Oil Transportation) and C (Hazardous Materials Regulations)). See Sec. 33010 of MAP-21, amending 49 U.S.C. 5123. FRA is revising all references to the maximum and minimum civil penalties in its regulations and guidelines in order to reflect the following statutory changes:

--The maximum civil penalty was increased from \$50,000 to \$75,000 for a knowing violation and from \$100,000 to \$175,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property.

--The minimum civil penalty of \$250 was eliminated, except that a minimum civil penalty of \$450 still applies to a violation related to training.

## **Revisions to Civil Penalty Assessment Guidelines**

FRA's hazardous material transportation enforcement civil penalty guidelines are published in appendix B to 49 CFR part 209, to provide the regulated community and the general public with information concerning the manner in which FRA generally begins its hazmat penalty assessment process and the types of information that respondents in enforcement cases should provide to justify reduction of proposed penalties. These guidelines were first published in the Federal Register on July 25, 1996 in response to a request contained in Senate Report 103-150 that accompanied the Department of Transportation and Related Agencies Appropriations Act of 1994. 61 FR 38644. These guidelines are periodically updated, and FRA most recently published revisions to them on July 27, 2010, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461, note). 75 FR 43840.

In this final rule, FRA is revising all references to the maximum and minimum civil penalties published in appendix B to 49 CFR part 209 in order to reflect the statutory changes of MAP-21.

## **Statutory Authority**

This final rule is published under the authority of 49 U.S.C. 5123, which provides civil penalties for violations of the Federal hazmat laws or a regulation, order, special permit, or approval issued under those laws. The hazardous material transportation regulations are issued by the Pipeline and Hazardous Materials Safety Administration. 49 CFR 1.97(b). Responsibility for the enforcement of the Federal hazmat laws and regulations primarily in instances where violations involve railroads and those entities that ship by rail has been delegated to FRA. 49 CFR 1.89(j). This rule revises references

in FRA's regulations to reflect revisions to the civil penalty provisions in the Hazardous Materials Transportation Safety Improvement Act of 2012. The amendments to the statutory provisions became effective on October 1, 2012, and FRA is implementing these amendments within respect to violations that occur on or after that date.

### **Public Participation**

FRA is proceeding to a final rule without providing a notice of proposed rulemaking or an opportunity for public comment. Public comment is unnecessary because, in making these revisions, FRA is not exercising discretion in a way that could be informed by public comment. As such, notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest” within the meaning of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). FRA is issuing these revisions as a final rule applicable to all hazardous material civil penalty cases under its authority to cite for violations that occur on or after October 1, 2012.

### **REGULATORY IMPACT**

#### **A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures**

This final rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under Executive Orders 12866 and 13563. Accordingly, this final rule was not reviewed by the Office of Management and Budget (OMB). Further, this rule is not a significant regulatory action under the Regulatory Policies and Procedures of the DOT because it is limited to a ministerial act on which the agency has no discretion. 44 FR 11034. The economic impact of the final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

## **B. Regulatory Flexibility Act and Executive Order 13272**

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This rule applies to shippers and carriers of hazardous material and persons who manufacture, mark, certify, or sell packagings, containers, and packaging components as qualified for use in transporting hazardous materials in commerce, some of whom are small entities. However, there is no economic impact on any person who complies with the Federal hazmat laws and the regulations, orders, special permits, and approvals issued under that law.

## **C. Federalism Implications**

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”), and the President’s May 20, 2009 memorandum on “Preemption” (74 FR 24693, May 22, 2009). As amended in 2005, 49 U.S.C. 5125(h) provided that the preemption provisions in Federal hazmat laws do “not apply to any . . . penalty . . . utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.” Accordingly, this final rule does not have any preemptive effect on State, local, or Indian tribe enforcement procedures and penalties, and preparation of a federalism assessment is not warranted.

## **D. Compliance with the Unfunded Mandates Reform Act of 1995**

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate

requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of [\$140,800,000 or more (as adjusted for inflation)] in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$140,800,000 or more in any one year by State, local, or Indian Tribal governments, or the private sector, and thus preparation of such a statement is not required.

#### **E. Environmental Assessment**

There are no significant environmental impacts associated with this final rule.

#### **F. Energy Impact**

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). According to definitions set forth under the Executive Order, there will be no significant energy action as a result of the issuance of this final rule.

#### **G. International Trade Impact Assessment**

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international

standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

## **H. Paperwork Reduction Act**

There are no new information collection requirements in this final rule.

## **I. Privacy Act**

Anyone is able to search the electronic form of any comments or other written communications received into any of FRA's dockets, by the name of the individual submitting the comment or other written communication (or signing the comment or other written communication, if submitted on behalf of an association, business, labor union, etc.). See <http://www.regulations.gov/#!privacyNotice> for the privacy notice of regulations.gov, or you may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

## **List of Subjects in 49 CFR Part 209**

Administrative practices and procedures, Hazardous materials transportation, Penalties, Railroad safety, Reporting and recordkeeping requirements.

## **The Final Rule**

In consideration of the foregoing, chapter II, subtitle B of title 49 of the Code of Federal Regulations is amended as follows:

### **PART 209--[AMENDED]**

1. The authority citation for part 209 is revised to read as follows:

**Authority:** 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.89.

2. Revise § 209.103 to read as follows:

**§ 209.103 Minimum and maximum penalties.**

(a) A person who knowingly violates a requirement of the Federal hazardous materials transportation laws, an order issued thereunder, subchapter A or C of chapter I, subtitle B, of this title, or a special permit or approval issued under subchapter A or C of chapter I, subtitle B, of this title is liable for a civil penalty of not more than \$75,000 for each violation, except that—

(1) The maximum civil penalty for a violation is \$175,000 if the violation results in death, serious illness, or severe injury to any person, or substantial destruction of property and

(2) A minimum \$450 civil penalty applies to a violation related to training.

(b) When the violation is a continuing one, each day of the violation constitutes a separate offense. 49 U.S.C. 5123.

(c) The maximum and minimum civil penalties described in paragraph (a) of this section apply to violations occurring on or after October 1, 2012.

3. In § 209.105, revise the last sentence of (c) to read as follows:

**§ 209.105 Notice of probable violation.**

\* \* \* \* \*

(c) \* \* \* In an amended notice, FRA may change the civil penalty amount proposed to be assessed up to and including the maximum penalty amount of \$75,000 for each violation, except that if the violation results in death, serious illness or severe injury



to any person, or substantial destruction of property, FRA may change the penalty amount proposed to be assessed up to and including the maximum penalty amount of \$175,000.

4. Amend appendix B to part 209 as follows:
  - a. Revise the second sentence of the first paragraph of the introductory text;
  - b. Revise the last sentence of the second paragraph of the introductory text;
  - c. Revise the fifth sentence of the third paragraph of the introductory text;
  - d. Revise the table entry for “173.24(b)(1) and 173.24(b)(2) and 173.24(f)(1) and 173.24(f)(1)(ii)”;
  - e. Revise the table entry for “173.24(c)”;
  - f. Revise footnote 2 to the table.

The revisions read as follows:

**Appendix B to Part 209—Federal Railroad Administration Guidelines for Initial Hazardous Materials Assessments**

\* \* \* The guideline penalty amounts reflect the best judgment of the FRA Office of Safety Assurance and Compliance (RRS) and of the Safety Law Division of the Office of Chief Counsel (RCC) on the relative severity of the various violations routinely encountered by FRA inspectors on a scale of amounts up to the maximum \$75,000 penalty, except the maximum civil penalty is \$175,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, and a minimum \$450 penalty applies to a violation related to training. \* \* \*

\* \* \* When a violation of the Federal hazardous material transportation law, an order issued thereunder, the Hazardous Materials Regulations or a special permit,

approval, or order issued under those regulations results in death, serious illness or severe injury to any person, or substantial destruction of property, a maximum penalty of at least \$75,000 and up to and including \$175,000 shall always be assessed initially.

\* \* \* In fact, FRA reserves the express authority to amend the NOPV to seek a penalty of up to \$75,000 for each violation, and up to \$175,000 for any violation resulting in death, serious illness or severe injury to any person, or substantial destruction of property, at any time prior to issuance of an order. \* \* \*

### Civil Penalty Assessment Guidelines

\* \* \* \* \*

49 CFR section	Description	Guideline amount <sup>2</sup>
	* * * * *	
173.24(b)(1) and 173.24(b)(2) and 173.24(f)(1) and 173.24(f)(1)(ii)	<b>Securing closures:</b> These subsections are the general "no leak" standard for all packagings. Sec. 173.24(b) deals primarily with <u>packaging</u> as a whole, while § 173.24(f) focuses on <u>closures</u> . Use §173.31(d) for tank cars, when possible. Cite the sections accordingly, using both the leak/non-leak criteria and the package size considerations to reach the appropriate penalty. <i>Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of \$75,000, and up to \$175,000 if the violation results in death, serious illness or injury or substantial destruction of property. For intermodal (IM) portable tanks and other tanks of that size range, use the tank car penalty amounts, as stated in § 173.31.</i>	
	- Small bottle or box.	1,000
	- 55-gallon drum.	2,500
	- Larger container, e.g., IBC; <i>not</i> portable tank or tank car.	5,000
	- IM portable tank, cite § 173.24(f) and use the penalty amounts for tank cars: Residue, generally, § 173.29(a) and, loaded, § 173.31(d).	
	- Residue adhering to outside of package (i.e., portable tanks, tank cars, etc.).	5,000

\* \* \* \* \*

173.24(c)	Use of package not meeting specifications, including required stencils and markings. The most specific section for the package involved should be cited (see below). The penalty guideline should be adjusted for the size of the container. <i>Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of \$75,000, and up to \$175,000 if the violation results in death, serious illness or injury or substantial destruction of property.</i>	
	- Small bottle or box.	1,000
	- 55-gallon drum.	2,500
	- Larger container, e.g., IBC; <i>not</i> portable tank or tank car, <i>but</i> this section is applicable to a hopper car.	5,000
	<i>For more specific sections: Tank cars—§ 173.31(a), portable tanks—§ 173.32, and IM portable tanks—§§ 173.32a, 173.32b, and 173.32c.</i>	

\* \* \* \* \*

<sup>2</sup> A person who knowingly violates the hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder, is subject to a civil penalty of up to \$75,000 for each violation, except that the maximum civil penalty for a violation is \$175,000 if the violation results in death, serious illness, or severe injury to any person or substantial destruction of property; and a minimum \$450 civil penalty applies to a violation related to training. Each day that the violation continues is a separate offense. 49 U.S.C. 5123; 28 U.S.C. 2461, note.

Issued in Washington, DC on February 6, 2013\_\_\_\_\_.

Joseph C. Szabo,

Administrator.

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